

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON

TRANSCRIPT OF PROCEEDINGS

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IN RE: ETHICON, INC., PELVIC REPAIR  
SYSTEM PRODUCTS LIABILITY LITIGATION

MDL NO.  
2:12-MD-2327  
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TELEPHONIC MOTIONS HEARING

May 18, 2015

**BEFORE THE HONORABLE CHERYL A. EIFERT  
UNITED STATES MAGISTRATE JUDGE**

Court Reporter:

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Proceedings recorded by mechanical stenography; transcript  
produced by computer.

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**Also Present:**

**MR. DAVID KELTNER**  
Kelly, Hart & Hallman

1                                    P R O C E E D I N G S

2                    JUDICIAL ASSISTANT: Hello, everyone. This is  
3 Laura Tatman, Judge Eifert's Judicial Assistant.

4            I would first like to confirm the court reporter today,  
5 Lisa Cook, is on the line.

6                    COURT REPORTER: Hi, Laura. Yes, I'm here.

7                    JUDICIAL ASSISTANT: Thank you, Lisa.

8            This call is in regard to the Ethicon MDL,  
9 2:12-MD-2327.

10           I would next like to confirm Justice Keltner is on the  
11 line.

12                    JUSTICE KELTNER: I'm here.

13                    JUDICIAL ASSISTANT: Thank you.

14            May I ask who is on the line for plaintiffs' counsel,  
15 please?

16                    MS. BOSSIER: Sheila, Bossier, B-o-s-s-i-e-r.

17                    JUDICIAL ASSISTANT: Sheila, I'm sorry, I did not  
18 get your last name. Could you say that again, please?

19                    MS. BOSSIER: Sure. It's Bossier, B-o-s-s-i-e-r.

20                    JUDICIAL ASSISTANT: Thank you very much.

21                    MR. HARLOE: This is John Harloe, H-a-r-l-o-e.

22                    JUDICIAL ASSISTANT: Thank you.

23            Anyone else for plaintiffs' counsel?

24            (No Response)

25                    JUDICIAL ASSISTANT: All right. Defense counsel,

1 please.

2 MR. BERNARDO: Good afternoon. This is Richard  
3 Bernardo for Ethicon.

4 MR. WATSON: Ben Watson for Ethicon.

5 JUDICIAL ASSISTANT: Thank you.

6 MR. PARRISH: Ashley Parrish for Ethicon.

7 JUDICIAL ASSISTANT: All right.

8 MS. ROSE: Nina Rose for Ethicon.

9 JUDICIAL ASSISTANT: Nina, I'm sorry. Would you  
10 tell me your last name again, please?

11 MS. ROSE: Sure. It's Rose, R-o-s-e.

12 JUDICIAL ASSISTANT: Thank you. If that is  
13 everyone, if you will hold for a moment --

14 Oh, who just rang in, please?

15 MS. TURMAN-VEDRAL: Hi. This is Sara  
16 Turman-Vedral for the plaintiffs.

17 JUDICIAL ASSISTANT: Sara, would you spell your  
18 last name for us, please?

19 MS. TURMAN-VEDRAL: Sure. It's a tricky one.  
20 It's Turman, T-u-r-m-a-n, and a hyphen, Vedral, V-e-d-r-a-l.

21 JUDICIAL ASSISTANT: Thank you very much.

22 One moment for Judge Eifert, please.

23 (Pause)

24 THE COURT: Hello, everyone.

25 UNIDENTIFIED SPEAKER: Good afternoon, Judge

1 Eifert.

2 THE COURT: I understand that Justice Keltner is  
3 on the line. Is that right? Justice Keltner is on the line  
4 as well?

5 JUSTICE KELTNER: Yes, I'm here. I'm sorry.  
6 Someone beeped and I couldn't hear.

7 THE COURT: And Lisa is also on the line?

8 COURT REPORTER: Yes, Judge. Hi.

9 THE COURT: All right. Thanks, Lisa. Hi.  
10 Okay. Well, I don't know what we're doing today, so  
11 I'll just pass it over to someone.

12 MR. BERNARDO: Judge Eifert, this is Rich Bernardo  
13 if I may set the table.

14 We -- as you recall the last time the parties spoke  
15 with you, we submitted competing proposals for coordinating  
16 the privilege dispute between the MDL and Texas on a forward  
17 going basis. And each of the parties submitted a protocol  
18 with an explanation as to why they thought the issues in, in  
19 theirs were -- or the coordination that they set forth was  
20 preferable.

21 And we had discussed that you, Judge Eifert, and  
22 Justice Keltner would talk among yourselves, and after that  
23 call we would get together with both of you on the phone to  
24 discuss the protocols and perhaps the parties could come to  
25 an agreed upon protocol that we could submit to Your Honors

1 jointly.

2 There really were two issues, or, or categories of  
3 issues. One I would describe as the logistics of the number  
4 of privilege documents in each tranche, how quickly  
5 defendants would review them, whether the parties would meet  
6 and confer, et cetera.

7 Since our hearing, Ethicon, or counsel for Ethicon put  
8 together a more detailed proposal that we submitted to  
9 plaintiffs that we believe addresses the issues that they  
10 were raising. And we, rather than wait to get agreement on  
11 it, have been moving forward with respect to that protocol.

12 So, for example, we agreed to de-duplicate and review  
13 sets of materials on an on-going rolling basis even before  
14 decisions were made. We've already gone through the  
15 de-duplication process with over 4,000 documents.

16 We have gone through a review to try and downgrade  
17 certain privilege decisions and/or identify those that we  
18 maintain on a rolling basis. We've given those to  
19 plaintiffs' counsel.

20 We think it's a very workable order that hopefully  
21 takes into account the concerns that plaintiffs have raised.  
22 We've asked them for their input on it and are hopeful to  
23 get that shortly so that perhaps that issue is one that we  
24 don't need guidance from the MDL and from the Texas court  
25 on.

1       The other issue is I'll say the larger picture of  
2 coordination. And I think there were two different views of  
3 what coordination ought to be. From the plaintiffs'  
4 perspective, it appears to Ethicon that what they were  
5 really looking for was for the Texas court to make the  
6 decision, but simply provide copies of it, as well as the  
7 parties providing copies of the documents to the MDL.

8       From Ethicon's perspective, we were expecting that what  
9 coordination meant would be that both Judge Eifert and Judge  
10 Keltner, Justice Keltner would be jointly involved in, in  
11 whatever method that you wanted in looking at these  
12 documents and coordinating their respective views just as  
13 you would, for example, take into account other courts' case  
14 law, et cetera.

15       You would take into account each other's views and  
16 whether issuing a joint order or separate orders, the orders  
17 would reflect the input of both the MDL and Texas so as to  
18 avoid, as much as possible, inconsistent rulings which we  
19 think would not be in the spirit of coordination.

20       And that's the issue that we would like some input on.  
21 We spoke a little bit with Justice Keltner following your,  
22 your discussion with him, although the bulk of our  
23 discussion with Justice Keltner - we had another one today -  
24 has been focused on the 47 documents that are presently at  
25 issue which we understood, Judge Eifert, you were not going

1 to be ruling on or looking at.

2 But we were hoping, again, to get your collective  
3 judgment. And we thought it made sense to do it on one call  
4 to avoid any miscommunication; that perhaps the parties can  
5 go back and try and agree upon some protocol that moves this  
6 forward so that we can not only be looking at the documents  
7 among ourselves and sharing them with plaintiffs so that we  
8 can, we can brief them to the extent there are disagreements  
9 for resolution. That would be the reason we requested this  
10 call, Judge Eifert.

11 THE COURT: All right. Well, Justice Keltner and  
12 I did have a conversation. And I did tell him that I did  
13 not feel that I should be involved in the pending motion,  
14 which is the 47 documents. That's been pending in front of  
15 the Texas court for some time now and I think I've made it  
16 clear from the very beginning I did not feel it was my place  
17 to get involved in a pending motion.

18 Then we did talk about what to do going forward. And  
19 the impression that I had from speaking with Justice  
20 Keltner -- and, of course, he's on the phone, so he can tell  
21 me if he disagrees. But we, we were talking just sort of in  
22 terms of trying to divide up the documents.

23 It didn't make sense to either one of us to have both  
24 of us looking at the same two, three, or 4,000 documents.  
25 Neither one of us have that kind of time, nor do we want to



1 do that.

2 I think where I see some minor issues, as far as  
3 logistics and coordination, is that Justice Keltner will be  
4 making a proposed recommendation, I guess, to the Texas  
5 judge, Judge Molberg. Mine would not be in the form of a  
6 proposal. Mine would come out as an order, which the  
7 parties would then have an opportunity to object to.

8 So that format is a little bit different. And I don't  
9 know the time frames in the Texas court, how that will work.  
10 Here you would have two weeks to object to my order, and  
11 then Judge Goodwin would make a final decision I would think  
12 fairly quickly. So there's that issue.

13 And then the other, the other minor issue is that if  
14 I'm looking at documents that are work product, I would be  
15 applying federal law since federal law is what you use in  
16 Federal Court for work product issues.

17 We would be using, I guess, New Jersey law if we're  
18 talking about attorney/client privilege. So we would be on  
19 the same page with the attorney/client privilege, but there  
20 might be some slightly different law that we would be using  
21 on work product. But I think our general discussion was we  
22 could find a way to sort of divvy up the documents.

23 I think one last issue was how to get the documents in  
24 front of me. I have said in the past to the parties one way  
25 to do that is the plaintiffs can file a motion asking for

1 the confidential label to be removed. I think another way  
2 would be for Ethicon to file a motion for protective order  
3 asking that certain documents be recognized as privileged.  
4 So either way, I think that would be a fairly simple thing  
5 to do.

6 I think, more importantly, would be how are we going to  
7 divide up the documents and, and how will the time frames  
8 work as far as that goes.

9 I think both Justice Keltner and I agree that it's,  
10 that it just would work better to have both of us looking at  
11 separate sets of documents and perhaps discussing as we're  
12 going through the documents. If we have any, any doubt or  
13 there's any major issues that come up, we would have some  
14 regular conversations, but not really try to do each other's  
15 job, so to speak.

16 Justice, is that how you understand it?

17 JUSTICE KELTNER: It is.

18 THE COURT: So I think we're -- I think we're on  
19 the same page. I'm not really sure from the standpoint of  
20 getting the documents to us, making the division, how the  
21 parties want to do that.

22 It doesn't make sense to have the Texas court ruling on  
23 every single document that's going to affect 40 some  
24 thousand cases. And I think that it's not fair to do that  
25 either.

1           On the other hand, I don't want to interfere with  
2 on-going litigation. So we've got to strike some balance as  
3 far as getting the documents, divvying them up between the  
4 two courts so that we can move forward.

5           MR. BERNARDO: Thank you, Judge Eifert. This is  
6 Rich Bernardo again.

7           One question I have, if I may, with respect to divvying  
8 them up. Was it your and Justice Keltner's thought in  
9 divvying them up that there would be certain documents for  
10 which no challenge was made in, in the Texas court and  
11 certain documents for which no challenge would be made in  
12 the Federal Court?

13           In other words, I'm, I'm trying to understand how we  
14 would propose to divide them up so if there were further  
15 input you had in, in that subject, that would be helpful.

16           THE COURT: No, I, I understood that there would  
17 be a similar challenge made to the same documents in both  
18 courts, but that some of the documents will be reviewed by  
19 me and some of the documents would be reviewed by Justice  
20 Keltner.

21           We didn't really have any discussions in any great  
22 detail about how we would divide up the documents. And I  
23 don't -- I really don't have any preference to be honest  
24 with you.

25           The only -- as I said, the only issue at all that I saw

1 about that was that the work product will be slightly  
2 different because I would be applying federal law. I'm not  
3 sure that it's tremendously different than the law that  
4 would be applied via State Court cases, but that might be  
5 one little difference.

6 But that was, that was my thought was just a way to  
7 divide up the workload so that we're both looking at  
8 documents and we're not looking at the same documents.

9 I don't know if the parties have any preference on how  
10 they want to do that.

11 MS. BOSSIER: This is Sheila Bossier for  
12 plaintiffs.

13 I really -- I don't, Judge Eifert, at this point. I  
14 think we're going to have to give it just a little bit of  
15 thought since that was something that I had not contemplated  
16 in, in trying to go forward that way.

17 Right now just off-the-cuff I would say that we would  
18 probably try to find documents that were relevant to the  
19 Cassis (phonetic) case; to have Justice Keltner look at  
20 those, and then potentially others for your review to the  
21 extent we can identify those in the privilege log.

22 But that's just a very general statement that I'm  
23 making. We would need to look at it in more detail.

24 MR. BERNARDO: Yes. And I think it makes sense --  
25 and thank you, Judge Eifert, for your comments. I mean,

1 that's, that's what we were looking for so the parties could  
2 meet and confer and see if we could come up with some  
3 agreement.

4 But would, would your looking at one group of documents  
5 and Justice Keltner looking at another group of documents  
6 eliminate or minimize the risk of inconsistent privilege  
7 rulings? And is that what you were talking about where you  
8 would consult with each other --

9 I'm, I'm trying to make sure that from Ethicon's point  
10 of view, we, in talking with plaintiffs, can arrive at a  
11 protocol that, that achieves the very reason that we were  
12 seeking coordination, which is avoiding inconsistent  
13 rulings.

14 And we are already a little concerned that the 47  
15 documents, since they address some core issues, may have --  
16 may result in some inconsistent rulings without the MDL  
17 being put on those.

18 But I'm, I'm trying to think about, so that we can work  
19 with plaintiffs' counsel, a way to fashion an order so that  
20 we can make sure we achieve the benefit of what we're trying  
21 to accomplish here with the coordination between the two  
22 courts.

23 THE COURT: Well, just, just, just thinking off  
24 the top of my head, I think -- one thing that Justice  
25 Keltner and I talked about is there are going to be some

1 documents that are just clearly attorney/client privilege  
2 because they're just your standard attorney communication.  
3 It's not going to be anything that's a real head-scratcher.  
4 Probably the same goes for work product.

5 And, so, those would be the kinds of things that we  
6 really probably wouldn't need to talk much about, if at all.  
7 But there would be a, a percentage of the documents that  
8 might be a little more gray or that could go either way.  
9 And we had sort of said those would be the types of  
10 documents that we ought to talk about, have some  
11 communication on, just see how -- see what the other person  
12 is thinking. And I feel confident that we can reach some  
13 sort of agreement on those sorts of documents.

14 So I think that's what we were talking about doing as  
15 far as, as discussing. I, I don't think -- as I said, the  
16 one thing we both seem to want to avoid was looking at all  
17 of the same documents and then talking about every single  
18 document because that just doesn't make any sense.

19 I think as far as getting the documents divided up, the  
20 product that you are -- the product you're litigating in  
21 Texas I don't think is a product that's really been  
22 discovered in the MDL, has it?

23 So I would, I would think documents that are very  
24 specific to that product should go to Justice Keltner for  
25 certain. There would be no real nexus to the MDL at this

1 point. There would be no reason for those documents to be  
2 brought in front of me at this point since you're not  
3 discovering that particular product.

4 More generic documents and documents that apply to  
5 other products, I think those would be the ones that  
6 certainly the MDL would be interested in, in participating  
7 in the review.

8 MR. BERNARDO: Judge Eifert, this is Rich  
9 Bernardo.

10 With respect to the documents on Prosima, one thing  
11 we've found as we've been looking at the documents that came  
12 through the results of the searches that were run for  
13 Prosima is that they, they don't uniquely deal with Prosima.  
14 They deal with Prosima as one of several products that were  
15 de-commercialized at the same time. And there are a lot of  
16 documents that relate to multiple products, many of which,  
17 if not all of which, are the subject of the MDL.

18 So, unfortunately, it's not as clean as, "Here is a  
19 document just on Prosima." And perhaps that's something  
20 that, taking upon the point you raised, whoever is looking  
21 at the documents, to the extent there are ones that have  
22 gray areas in them, would consult with the other because  
23 they, they will have impact on the larger litigation.

24 And, in addition, the other issue is that even if the  
25 product may not, the principles underlying the claim for

1 privilege, which is what we're really trying to harmonize  
2 between the courts, would apply in both.

3 In other words, a ruling that a particular person isn't  
4 acting in the capacity as, as legal counsel but is acting in  
5 some other capacity, or a ruling that a communication that  
6 doesn't involve attorneys isn't privileged because it, it  
7 doesn't have an attorney on -- I'm just raising a couple of  
8 points that have been made in the back and forth on these,  
9 on these privilege challenges.

10 But those principles would have importance both in the  
11 MDL and Texas and we'd want to, to, as much as we could, to  
12 ensure some coordination of resolution of some of those core  
13 concepts.

14 THE COURT: Well, those might be documents that  
15 you could identify for both Justice Keltner and myself as  
16 you're submitting documents to be reviewed.

17 I would think that -- I would think that the parties  
18 ought to try to agree on what they want to submit to me,  
19 what they want to submit to Justice Keltner, and then file a  
20 motion of some sort with me because right now I don't have  
21 any sort of motion pending.

22 Then if there are documents that you feel are going to  
23 cause the most amount of trouble or there are core issues  
24 that you think are going to cause the most amount of  
25 trouble, if you could bring those to our attention, then we



1 could certainly talk about that.

2 MR. BERNARDO: Rich Bernardo.

3 That, that sounds fair, Your Honor. And perhaps in,  
4 in, hindsight, in other words, after a ruling by one or the  
5 other -- let's say there's a ruling by Justice Keltner that  
6 we think impacts or could impact the, a, a volume of  
7 documents in the MDL. May we bring that to your attention  
8 by way of motion to the extent it doesn't apply to documents  
9 that you have ruled on?

10 THE COURT: Well, I don't know about that. I, I  
11 don't -- yeah, I don't think either Justice Keltner or  
12 myself want to be in a position of acting like an appellate  
13 court to the other, to the other court.

14 I think the, the only way that this really makes sense  
15 to me -- and I'd like to hear from Justice Keltner -- is to  
16 just divide the documents up in some way. I -- that's the  
17 only thing that I can really think of that makes sense.

18 And then, as I said, if you are aware of certain  
19 documents or certain core issues, if you want to raise those  
20 before anybody has issued an order, that's when those things  
21 should be raised. And then Justice Keltner and I will have  
22 a chance to discuss our thoughts.

23 But ultimately the person who is responsible for the,  
24 for the documents or set of documents will be the one that  
25 will issue the order. I mean, that's the way it would be no

1 matter what.

2 I, I don't -- I think even though you've got the MDL  
3 trying to coordinate discovery and, and all of that, the  
4 purpose of the MDL is to try to, to improve on judicial  
5 economy. And, so, that's the goal that I'm trying to  
6 achieve here.

7 I don't think that works if everything I do Justice  
8 Keltner looks at, everything he does I look at. I don't  
9 think that's -- that's just going to defeat the purpose.

10 MR. BERNARDO: I understand, Your Honor.

11 THE COURT: But I also don't think it -- I also  
12 don't think the plaintiffs need to put up every document in  
13 a case when those documents don't have anything to do with  
14 the case. So -- just in order to get a ruling which they  
15 think might be more favorable to them.

16 I'm not saying that's what they're doing, but -- and I  
17 don't think Ethicon ought to, ought to do the reverse of  
18 that. So, you know, I want to, I want to avoid that as  
19 well.

20 MR. BERNARDO: Thank you.

21 JUSTICE KELTNER: This is Keltner.

22 I very much agree. Two things.

23 If we are attempting any kind of judicial economy,  
24 having everybody rule on the same document twice makes no  
25 sense.

1       The second issue that Judge Eifert and I had talked  
2 about at some length is that there are obviously going to be  
3 some limitations upon our ability to completely agree with  
4 each other.

5       We give up, both of us, some constitutional granted  
6 authority in doing that, even though we're both reporting to  
7 different judges who have the ultimate responsibility. So  
8 we've sort of got to call them like we see them.

9       Does that mean we don't discuss issues that have been  
10 raised? No. We can do that, but it doesn't guarantee that  
11 we're going to come out exactly right -- you know, exactly  
12 the same on each one.

13       The -- you know, here's what we fear. And, and this  
14 may be the better way to look at this. We fear that one  
15 side wants us to actually duplicate efforts and get  
16 everything decided the same way after some degree and  
17 consultation, give and take and the like. That's something  
18 we cannot do.

19       The second thing is we also think that there's an  
20 interest in getting the best possible ruling somewhere which  
21 benefits the person seeking to undo the privilege. And  
22 that's something that the system will want to try to avoid.

23       So there are chances, not saying it's happened, but  
24 there are chances of overreach both ways. Obviously, both  
25 of us want to try to limit those.

1 MR. BERNARDO: Thank you, Your Honor. Well --  
2 this is Rich Bernardo again.

3 Judge Eifert and Justice Keltner, unless plaintiffs  
4 have any questions or comments, counsel for Ethicon found it  
5 helpful and I think what we need to do is to consult with  
6 plaintiffs' counsel and first see if we can make sure we  
7 agree on the, the procedure for, for getting through these  
8 documents, and then see if we can come to some agreement as  
9 to how to divvy them up; and then come back to both Your  
10 Honors with either an agreed upon protocol, or if there's  
11 some areas of disagreement, maybe we can schedule another  
12 joint phone call to raise those and see if we can try and  
13 cut through them by way of a discussion with, with both of  
14 you.

15 THE COURT: Well, it makes sense to me.

16 JUSTICE KELTNER: Let me -- Judge Eifert and I  
17 have not had -- this is Keltner -- had the opportunity to  
18 discuss this. But on the 47 documents, I have had a  
19 conversation this morning, so the plaintiffs will know, with  
20 the court reporter (verbatim) under the protocol we had all  
21 approved and, and been getting very close to ruling on  
22 those.

23 I have gone back through a couple of things and looked  
24 at those. I am probably going to try to set up a call with  
25 Judge Eifert to discuss three separate matters that actually

1 did not come up in today's call that I, I don't  
2 completely -- I want to make sure that we have both  
3 discussed those and generally how we feel about them.

4 Probably we'll try to do that, Judge, with you sometime  
5 early this week and I'll send -- we'll crisscross back and  
6 forth, if you don't mind, on, on setting up a time.

7 THE COURT: Sure.

8 JUSTICE KELTNER: I need to get a little bit more  
9 research done in one area on New Jersey law that is a little  
10 bit, is a little bit of foreign territory to me. But I'll  
11 get that done and then I'll call. So just please be aware  
12 of that coming down the road pretty quickly.

13 THE COURT: All right. Well, it sounds like  
14 there's a plan. So I will just wait, then, to hear from  
15 you, Justice Keltner.

16 And then, Mr. Bernardo and plaintiffs, I will wait to  
17 hear something more from you.

18 And I think once you do decide how you want to divide  
19 up the documents, you'll -- somebody will need to file a  
20 formal motion in this court with whatever it is that you've  
21 decided you want me to look at. And then I guess the same  
22 will need to be done in the Texas court.

23 MR. BERNARDO: We will do that. Thank you, Your  
24 Honor.

25 MS. BOSSIER: Thank you very much.

1 JUSTICE KELTNER: Thank you.

2 THE COURT: Bye-bye.

3 (Proceedings concluded at 1:59 p.m.)

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10 I, Lisa A. Cook, Official Reporter of the United  
11 States District Court for the Southern District of West  
12 Virginia, do hereby certify that the foregoing is a true and  
13 correct transcript, to the best of my ability, from the  
14 record of proceedings in the above-entitled matter.

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16

17 s\Lisa A. Cook

May 21, 2015

18 Reporter

Date

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